IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.988 of 2005

IN

NOTICE OF MOTION NO. 2575 OF 2004

IN

TESTAMENTARY PETITION NO. 618 OF 1995

Amrutlal Chandulal Bhagat .. Appellant

versus

Shailesh Kanubhai Shah .. Respondent

...

Mr.Girish Desai a/w Ms.S.V. Thakkar i/b M/s.Haridas & Co. for the appellant.

Mr.Shailesh Shah a/w Mr.R.A. Shah and Ms.Mridula Bhatia i/b M/s.M.Hiralal & Co. for the respondent.

CORAM : R.M. LODHA AND

D.G. KARNIK, JJ

DATED : 22nd November 2005.

P.C.:

Heard Mr.Girish Desai, the learned counsel for the appellant and Mr.Shailesh Shah, the learned

counsel for the respondent.

2. In challenging the impugned order, the learned counsel for the appellant contended that the Notice of Motion was not maintainable for seeking discharge of the appellant as an executor of the Will and testament dated 25th June 1991 of the deceased Saraswatiben Amrutlal Bhagat. He referred to section 301 of the Indian Succession Act 1925. He also relied upon the following judgements; i) Shrimati Karam Devi Vs. Radha Kishan & Others, Volume XVI, Indian Law Reporter (Lahore) page 975; ii) V. Sambandam Vs. V. Natarajan, 1969 Madras Reports, page 473. iii) Arjundas and others Vs. Vera Mishra of Bombay, European & another. 1995 A I H C Page 4200.

The submission of the learned counsel for the appellant is that the expression - application under section 301 of the Indian Succession Act 1925 has to be by way of petition."

3. The contention of the learned counsel for the appellant overlooks the reliefs prayed for in the Notice of Motion. The prayers made in the Notice of

Motion read thus:

"(a) the delay, if any, in taking out this Notice of Motion be condoned.

(b) The Exparte Order dated 26th day of June, 2003, made in Chamber Summons no.1193 of 2002 be set aside and the Chamber Summons be restored to the file of the Hon'ble Court for final disposal.

(c) The Plaintiff be removed as an executor of the said Last Will & Testament dated 25th June, 1991 of the said deceased Saraswatiben Amrutlal Bhagat.

(d) Court Receiver, High Court or some other fit and proper persons be appointed as Executor of the Estate of the said deceased Saraswatiben Amrutlal Bhagat and direct him to prosecute the Petition, obtain the Probate of the Will and to execute the Will in accordance with the direction in the said Will.

(e) Pending the hearing and final disposal of the said Suit, the Plaintiffs be restrained by order and injunction of this Hon'ble Court.

(i) from alienating or transfer or otherwise creating 3rd party right by way of Sale, Agreement for Sale, exchange or in any other manner or grant of leave tenancy or leave & licence or lease or create any third party right in any other manner in respect of Flat No.111 on the 11th Floor of the building EL-CID situate at 314, Ridge Road, Mumbai - 400 001 (hereinafter referred to as the said EL-CID flat) or any part

thereof;

(ii) permit the Applicant to visit and stay in the said EL-CID flat while his visit to India.

(f) For ad-interim reliefs in terms of prayer (c) hereinabove;

(g) for costs of this Notice of Motion, be provided for;

(h) for such further and other reliefs as the nature and circumstances of the case may require;

4. A bare look at some of the prayers made in the Notice of Motion would show that the said prayers could have been made only by way of Notice of Motion under Rule 142 of the Bombay High Court (Original Side) Rules Moreover, there is no specific Rule under the Bombay High Court (Original Side) Rules which provides for the form in which the application as contemplated u/s.301 is required to be made. Apparently, application u/s.301 is not in the nature of original proceedings and therefore, it cannot be said that such application can only be made by way of a petition. Rule 142 of the Bombay High Court (Original Side) Rules even otherwise provides that an application in the suits, matters or appeals that cannot be made by means of Chamber Summons shall be

made by way of Notice of Motion. In any case, the objection is too technical and does not merit acceptance. As a matter of fact, the objection regarding the maintainability of the Notice of Motion was not even raised before the learned Motion Judge.

5. The learned counsel for the appellant then contended that there was no justification for setting aside the order dated 25th June 2003 passed in the Chamber Summons no.1193 of 2003 taken out by the appellant for amendment in the Testamentary Petition. He would also contend that the respondent no.1 had given his consent to obtain the probate of the Will dated 25th June 1991 executed by deceased Saraswatiben Amrutlal Bhagat and having given his consent, it was not open to respondent no.2 to seek the appellant's discharge as executor.

6. None of these contentions appeal us. It is true that the respondent no.2 had given the consent to the appellant to obtain the probate of the Will executed by Saraswatiben Amrutlal Bhagat, but obviously, the consent was to obtain the probate of the will as executed by the deceased Saraswatiben Amrutlal Bhagat. What the appellant did was that

after having obtained the consent of the respondent no.2 to obtain the probate of the will and after having filed Testamentary Petition seeking probate of the will dated 25th June 1991, the appellant sought to amend the schedule of the properties covered by the Will dated 25th June 1991 and sought an amendment by means of Chamber Summons. The said course was prejudicial to the interest of the respondent no.2 and, therefore, he had to apply for setting aside the order dated 25th June 2003. The appellant is the husband of the testatrix while the respondent no.2 is her son. The alteration in the schedule of the properties that was annexed with the Testamentary Petition resulted in deleting some of the properties wherein the respondent no.2 got his share under the Will dated 25th June 1991. As a matter of fact, the appellant set up his own title in the property bequeathed by the testatrix in the Will dated 25th June 1991. In this background, the learned Testamentary Judge discharged the appellant as an executor of the Will and testament dated 25th June 1991 which cannot be faulted.

7. We clarify that upon setting aside the order dated 25th June 2003 in Chamber Summons no.1193 of

2003, the original pleadings in the Testamentary Petition stand restored. Since the appellant has ceased to be the executor, we direct the office to make necessary correction and endorsement to that effect in the testamentary petition.

9. For the aforesaid reasons, the stay of the order dated 25th June 2003 and the dismissal of Chamber Summons 1193 of 2003 also cannot be said to suffer from any legal infirmity.

Appeal does not deserve to be admitted. Appeal is dismissed in limine.

(R.M. LODHA, J)

(D.G. KARNIK, J)